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March 30, 2021

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You are hereby notified that the Court has entered the following opinion and order:

2019AP2221-CRNM State of Wisconsin v. John Lyndon Perry, Sr. (L.C. # 2018CF1003)

Before Dugan, Donald and White, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

John Lyndon Perry, Sr., appeals from a judgment of conviction for one count of first-degree recklessly endangering safety by use of a dangerous weapon. *See* WIS. STAT. §§ 941.30(1), 939.63(1)(b) (2017-18).[1] Perry's appellate counsel, Carl W. Chessir, has filed a

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Perry filed numerous responses. We have independently reviewed the record, the no-merit report, and Perry's responses, as mandated by ***Anders***. We conclude that there is no issue of arguable merit that could be pursued on appeal. Therefore, we summarily affirm.

The criminal complaint alleged that while Perry was in a convenience store, he had an argument with his adult male cousin, A.B.[2] A.B. told officers that during the argument, Perry displayed a pistol. The store owner escorted A.B. out of the store, and shortly afterward, Perry exited the store carrying the pistol. Perry "told the store owner to 'move' and then fired at [A.B.], striking [A.B.] in the right foot." The complaint further indicated that surveillance video from the store confirms A.B.'s statement, except the shooting itself "took place just off-camera."

The case proceeded to a jury trial. Perry did not testify, but during closing arguments, trial counsel suggested that Perry had fired a single round "not in anger, but in negligent utilization" of his pistol. Trial counsel argued that "[t]he negligence that was present in this situation … [was] civil and not criminal."

The jury was instructed on both first-degree and second-degree recklessly endangering safety. The jury found Perry guilty of first-degree recklessly endangering safety by use of a dangerous weapon. The trial court sentenced Perry to forty-two months of initial confinement and thirty-six months of extended supervision.

[2] The record reflects that the two men have known each other for years and are referred to as cousins, although they may be more distantly related.

The no-merit report addresses two issues: (1) whether there was sufficient evidence to support the jury's verdict; and (2) whether the trial court erroneously exercised its sentencing discretion. The no-merit report thoroughly discusses those issues, including references to relevant statutes, case law, transcripts, and other court documents. This court agrees that there would be no arguable merit to challenging the sufficiency of the evidence or the sentence. We will briefly discuss those issues, as well as the issues Perry raises in his response.

As the no-merit report explains, a jury verdict will be sustained if there is any credible evidence to support it. *See* ***Morden v. Continental AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659. Here, A.B. testified that Perry pointed the pistol at A.B.'s foot and pulled the trigger, striking A.B.'s foot. While the shooting itself was not captured on surveillance cameras, the events leading up to the shooting—which included Perry taking a pistol from his bag and exiting the store—were captured and shown to the jury. Further, the jury heard testimony from a police officer who said that although Perry was not at the store when the officer arrived, the officer spoke with Perry by phone. Perry told the officer that A.B. threatened him and that he shot A.B. The officer asked Perry to return to the scene, and when he did so, he gave his pistol to the officers. We agree with appellate counsel that there would be no arguable merit to challenging the sufficiency of the evidence.

There would also be no arguable merit to challenging the trial court's exercise of sentencing discretion or asserting that the sentence was unduly harsh and excessive. The trial court considered the requisite sentencing factors and explained its sentencing decision, consistent with the dictates of ***State v. Gallion***, 2004 WI 42, ¶¶40-43, 270 Wis. 2d 535, 678 N.W.2d 197. Further, the trial court could have imposed twelve-and-one-half years of initial confinement and five years of extended supervision. The sentence imposed was well within the maximum, and

we discern no erroneous exercise of discretion. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable.").

In his responses to the no-merit report, Perry identifies numerous issues of concern.[3] First, Perry argues that trial counsel and appellate counsel should have challenged the fact that the CR-215 Probable Cause Statement and Judicial Determination form completed by the police officers was not signed by a judge or court commissioner. This is not an issue of arguable merit because the probable cause determination can instead be made on the record as part of the initial appearance, which was the procedure used here. *See* ***County of Riverside v. McLaughlin***, 500 U.S. 44, 58 (1991) (recognizing that "jurisdictions may choose to combine probable cause determinations with other pretrial proceedings, so long as they do so promptly.").

In a related argument, Perry asserts that his counsel should have challenged the timing of his initial appearance, which was held on March 3, 2018, three days after he was arrested. Perry has not identified an issue of arguable merit. Failure to conduct a probable cause hearing within forty-eight hours of arrest is not a jurisdictional defect and is not grounds for dismissal with prejudice or voiding of a subsequent conviction unless the delay prejudiced the defendant's right to present a defense. *See* ***State v. Golden***, 185 Wis. 2d 763, 769, 519 N.W.2d 659 (Ct. App. 1994). Here, there is no indication that Perry was prejudiced by the delay.

[3] Perry explained his concerns in seven filings over the course of eleven months. We have concluded that Perry has not identified any issues of arguable merit, and we will address what we perceive to be his primary concerns.

Next, Perry raises numerous issues concerning the lack of physical testing. He asserts that trial counsel was ineffective for not challenging the lack of a gunshot residue test, the lack of a test to determine if Perry's pistol had been fired, and scientific testing of the bullet fragments. He also asserts that trial counsel should have objected to the lack of medical reports proving that A.B.'s foot was injured by a gunshot. To establish ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that the deficiency prejudiced his or her defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To show prejudice, the defendant must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. Here, the State produced significant evidence that Perry held the pistol as he exited the store, that he fired the pistol toward A.B., and that A.B. ran away, leaving a trail of blood. The jury also heard that an officer accompanied A.B. in the ambulance as he was transported to the hospital, where his foot was treated and bandaged. Having reviewed the trial transcript, we conclude there would be no arguable merit to asserting that Perry was prejudiced by trial counsel's alleged failure to point out the lack of those reports at trial. *See* ***id.***

Perry further alleges that trial counsel was ineffective for not securing an expert to testify about the requirements to obtain a concealed carry permit and the way Perry held the pistol as he exited the store. At trial, it was undisputed that Perry had a concealed carry permit. It is not clear that testimony concerning how he received that permit and whether he properly held the pistol to avoid an accidental discharge would have impacted the trial, as he was charged with recklessly shooting his cousin in the foot, not improperly carrying his pistol to avoid doing so.

We conclude there would be no arguable merit to asserting that trial counsel's performance was prejudicial with respect to this issue. *See* ***id.***

Next, Perry argues that trial counsel should have investigated Perry's claim that A.B. threatened people at the store in the days following his release from the hospital. The jury heard brief testimony from a defense witness that A.B. returned to the store and threatened him. It is not clear what additional investigation would have revealed or how it would have affected the trial. We conclude that there would be no arguable merit to alleging that Perry was prejudiced by the lack of investigation or additional testimony on this topic. *See* ***id.***

Perry alleges that trial counsel was ineffective for not introducing Perry's medical records at trial.[4] It is not clear what those records would have shown or how they would have affected the trial. Perry has not identified an issue of arguable merit.

Perry complains that his trial counsel did not explore the possibility of a diversion program for him and that he was not informed about plea discussions. However, Perry also indicates that he was not going to accept a plea offer. We conclude that there would be no arguable merit to pursuing postconviction proceedings on this issue.

Perry asserts that the State made improper comments about the fact that he carried a pistol, which he claims infringed on his Second Amendment rights. It is not clear which remarks Perry is referencing. We note that during the State's closing argument, it acknowledged that Perry had a concealed carry permit and argued that Perry acted recklessly when he picked up his

[4] The record indicates that Perry was taken to the hospital after his arrest due to concerns about his health.

pistol, walked outside the store, told the store owner to get out of the way, and fired the pistol at A.B. The State did not argue that Perry should be found guilty simply because he had a pistol. The State was entitled to "comment on the evidence, detail the evidence, [and] argue from it to a conclusion." *See* ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979) (citation omitted). We conclude there would be no arguable merit to alleging that the State's comments were improper.

Finally, Perry argues that because there was no scientific testing of bullet fragments found at the scene, the State should not have been allowed to suggest during its closing argument that the bullet fragments the detective recovered came from a bullet fired from Perry's pistol. Perry has not identified an issue of arguable merit. The detective testified about his experience collecting evidence at crime scenes and said that he recovered two bullet fragments from the scene; photos of those fragments were shown to the jury. The State was permitted to comment on that evidence and "argue from it to a conclusion." *See* ***id.*** (citation omitted).

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent Perry further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Carl W. Chessir is relieved from further representing John Lyndon Perry, Sr., in this appeal. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals